

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 1**

**BAXTER ACADEMY FOR TECHNOLOGY AND  
SCIENCE**

**Employer**

**and**

**Case 01-RC-239165**

**MAINE EDUCATION ASSOCIATION**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

The Petitioner, Maine Education Association, seeks a representation election among teachers and guidance counselors employed by Baxter Academy for Technology and Science (“Employer” or “Baxter Academy”).

The Employer asserts that the petition should be dismissed on the ground that the Board lacks jurisdiction under *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), and because it has only a *de minimis* impact on interstate commerce. In sum, the Employer asserts that the Board should exercise its discretion to decline jurisdiction over charter schools.

The Petitioner takes the position that the Board should assert jurisdiction over the Employer.

For the reasons set forth below, I find, based on the record and consistent with relevant case law, that Baxter Academy for Technology and Science, is an employer within the meaning of Section 2(2) the Act and is not a state or political subdivision statutorily excluded from the Act’s coverage. Accordingly, I conclude that the Board may assert jurisdiction over the Employer, and I shall direct an election in the petitioned-for unit.<sup>1</sup>

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<sup>1</sup> The appropriate unit, as stipulated by the parties, is:

## 1. **FACTS**<sup>2</sup>

The Employer operates a secondary school in Portland, Maine, with an enrollment of about 400 students and a teaching complement of about 32. The school is open to any high school student in the State of Maine, but its catchment area is a radius of 25 miles from the City of Portland. As described in detail below, it was created in 2013 under a charter from the State of Maine after its founding members submitted a charter application to the Maine Charter School Commission.

The day-to-day operation of the school is overseen by a principal and special education director, who has responsibility for disciplinary matters. The curriculum is divided into “pods” of content, including design, computer science, humanities, science, and math, as well as “tiers of concentration,” such as engineering. Under its charter, the Employer has the freedom to develop its own school day, which consists of five learning blocks followed by an hour of teacher collaboration. Similarly, the Employer created its own weekly schedule, which consists of four days of coursework followed by a day on which students have time to design and develop their year-long student projects. The Employer’s students and teachers have the same school

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All regular teachers and guidance counselors employed by the Employer at Baxter Academy for Technology and Science, 85 Lancaster Street, Portland, Maine, in at least fifty percent of a full-time position, but excluding all other employees, educational technicians, adjunct faculty paid by stipend, tutors, interns, substitutes, social workers, administrative/managerial employees (including administrative assistants, director of guidance, dean of students, IT manager, business manager, operations manager, principal, head of school, and executive director), confidential employees, guards, and supervisors as defined in the Act.

<sup>2</sup> During the hearing, the parties stipulated to the following:

1. The Employer, Baxter Academy for Technology and Science, is a Maine corporation with an office and place of business located at 85 Lancaster Street, Portland, Maine, where it is engaged in the operation of an educational institution. Annually, in the course and conduct of its business operations, the Employer receives gross revenues in excess of \$1 million and purchases and receives goods at its Portland, Maine campus goods valued in excess of \$50,000 directly from points located outside the State of Maine.
2. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act;
3. The Petitioner claims to represent the employees in the unit described in the petition, and the Employer declines to recognize the Petitioner;
4. There is no collective-bargaining agreement covering any of the employees in the unit sought in the petition, and there is no contract bar to this proceeding.

vacation weeks as their public school counterparts. Student transportation, however, is not shared with any other schools. The Employer's teachers participate in the state's retirement system, but not its health insurance plan.

#### **A. The Maine Public Charter Schools Law**

Baxter Academy for Technology and Science is a 501(c)(3) tax exempt organization which operates a charter school in Portland, Maine pursuant to the Maine Public Charter Schools Law ("PCSL"), 20-A M.R.S., Chapter 112. Enacted in 2011, the PCSL authorizes and regulates the establishment and operation of public charter schools in Maine. The state recognizes two types of charter schools: those authorized by the Maine Charter School Commission ("Commission"),<sup>3</sup> and those authorized by local or regional school boards. Under the PCSL, the Commission may authorize as many as ten charter schools in the first ten years after the statute's enactment. Presently there are nine such schools in Maine, including Baxter Academy. To date, no local or regional school boards have authorized charter schools in Maine.

Under the statute, a public charter school: (a) has autonomy over key decisions, including, but not limited to, decisions concerning finance, personnel, scheduling, curriculum and instruction; (b) is governed by a board that is independent of a school administrative unit; (c) is established and operated under the terms of a charter contract between the governing board and its authorizer in accordance with this chapter; (d) is a school to which parents choose to send their children; (e) provides educational programs as set forth in the statute; (f) operates in pursuit of the educational objectives defined in its charter contract; and (g) operates with oversight from the authorizing entity and in accordance with its charter contract.

All nine of the charter schools operating in Maine are "start-up charters." Start-ups, including the Employer, are required to submit an application to the Commission following

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<sup>3</sup> A M.R.S. §2405(1).

guidelines specified in the statute. After following a prescribed process for evaluating charter applications, the Commission reports its decision and action to the Maine Commissioner of Education and the Maine Legislature. The Education Commissioner is required to register the approved charter, which sets forth (1) performance provisions describing the academic and operational performance expectations and measures by which the public charter school will be judged; (2) administrative provisions articulating the administrative relationship between the Commission and the public charter school, including each party's rights and duties; and (3) a description of the standards and processes under which the Commission may pursue revocation of the charter contract. 20 A M.R.S. §2408(1). The initial term of the charter is five years, with five-year renewals thereafter.

#### **B. Baxter Academy's Charter**

The Employer submitted its charter application in May 2013<sup>4</sup> and opened its doors in September 2013 with approximately 130 students in grades 9 and 10. It has since expanded to about 400 students in grades 9 through 12 and renewed its charter in 2018.

Pursuant to the PCSL, the Commission retains oversight over the Academy's charter and operation. The Commission may require reports throughout the school year regarding the school's operation and conducts an annual review that includes monitoring visits with the Employer's stakeholders, a self-assessment, and a summary report based on the performance framework described in the school's charter. The Commission also oversees the charter renewal process, which begins in the school's fourth year and includes site visits, a public hearing, and extensive monitoring of the school's performance over the first term of its charter. A school risks nonrenewal of its charter if it fails to meet its performance framework; financial

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<sup>4</sup> The application was submitted by Chair and President Kelli Pryor on behalf of a group of founders of Baxter Academy. Pryor, who testified at the hearing, is currently the Employer's executive director.

performance targets; or testing and student achievement benchmarks, including attendance and graduation rates.

The Employer is funded through a combination of public and private sources. First, it receives state funding for each student it enrolls, as well as additional state funding for each special education student. Although it initially invoiced the local sending districts whose students attend Baxter Academy, state law was changed so that it now bills the state directly for each student. Because charter schools receive no local funding, the Employer must supplement its state subsidies with fundraising efforts and private donations. As required by the state, the Employer's budget process takes place in open public meetings, and, once approved, the budget is filed with the Commission. All charter school budget filings are public documents.

The Employer is overseen by a Board of Trustees comprised of seven members of the community who have skills and expertise in areas such as educational policy, school financing, business, and journalism. According to the Employer's charter, "The Board shall have the authority to decide matters related to the operations of the school including, but not limited to, budgeting, curriculum, and operating procedures and shall have final authority for the academic performance of the School." The Employer's original Board members were selected by the Employer's executive director, but, pursuant to the Employer's by-laws, subsequent Trustees have been elected by the Board. Although there was little testimony bearing directly on this issue, it does not appear that any elected or appointed officials comprise the Board of Trustees, or that the state has the authority to appoint or revoke the membership of any Trustee. Nor are the Employer's Trustees accountable to public officials or to the general electorate.

## **2. CONCLUSIONS AND ANALYSIS**

As noted above, the Employer asserts that the petition should be dismissed on the ground that the Board lacks jurisdiction under *NLRB v. Natural Gas Utility District of Hawkins County (Hawkins County)*, 402 U.S. 600 (1971), and because the school has only a *de minimis*

impact on interstate commerce. The Employer argues that the Board should decline asserting jurisdiction because Baxter Academy was created directly by the State of Maine. Specifically, the Employer contends that the Maine Charter School Commission's acts of authorizing the creation of Baxter Academy and entering into a charter contract with the school meet the *Hawkins County* requirement that jurisdiction should be denied if the entity was created directly by the state. Secondly, the Employer asserts that charter schools have a de minimis effect on interstate commerce and that Board jurisdiction is, therefore, improper.

As discussed below, these arguments lack merit. The evidence is insufficient to establish that Baxter Academy satisfies either prong of the *Hawkins County* test. Accordingly, I find that the Employer is not a political subdivision, but rather is an "employer" within the meaning of Section 2(2) of the Act.

**A. Under *Hawkins County*, the Employer is Not a State or Political Subdivision**

Under the test enunciated by the Supreme Court in *Hawkins County, supra*, an employer is a political subdivision of a state where it is: (1) "created directly by the state, so as to constitute departments or administrative arms of the government," or (2) "administered by individuals who are responsible to public officials or to the general electorate." 402 U.S. at 604-5. In the instant case, the evidence is insufficient to establish that Baxter Academy satisfies either prong of the *Hawkins County* test. Accordingly, I find that the Employer is not a political subdivision, but rather is an "employer" within the meaning of Section 2(2) of the Act.

**(1) The Employer was not Created Directly by the State to Constitute a Department or Administrative Arm of the Government**

Under the first prong of the *Hawkins County* test, the Board must first determine "whether the entity was created directly by the state, such as by a government entity, legislative act, or public official." *Hyde Leadership*, 364 NLRB No. 88, slip op. at 5. If the answer is in the affirmative, the Board then must consider "whether the entity was created so as to constitute a

department or administrative arm of the government." *Id.* Both of these criteria must be met in order to establish that an employer is exempt from jurisdiction. *Id.*; *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 6 (Aug. 24, 2016) (in asserting jurisdiction over a Pennsylvania charter school, the Board found that "although the [Charter Schools Law] provides that the Department of Education issues the charter... the Founding Coalition's incorporation of the School as a nonprofit entity and its promulgation of the School's governing and operating documents 'created' the School"). In *Hyde Leadership*, the Board concluded that a New York City charter school was "not created directly by any New York government entity, special statute, legislative, or public official, but instead by private individuals as a nonprofit corporation," and therefore was not exempt from jurisdiction under *Hawkins County's* first prong. *Hyde Leadership*, supra at 5. Expressly rejecting arguments that the New York State Board of Regents "directly created" the school by issuing the charter and incorporating the educational corporation, the Board wrote: "[W]e agree with the Regional Director that it was [the founder's] initiative and her and the founding board's preparatory work, including the promulgation of the School's governing and operating documents, that 'created' the School, not the Board of Regents' approval of the charter and incorporation of the School." *Id.* Further, although concluding that it was "unnecessary" to decide whether the school was created so as to constitute a department or administrative arm of the government, the Board went on to say that were it to address the issue, it "would find that the record evidence does not support the... claim that Hyde was created to be an administrative arm of the state's government." *Id.* at 6, n. 15. In so doing, the Board rejected arguments that certain language within the Charter Schools Act (CSA), as well as public funding and state oversight, rendered Hyde an administrative arm of the government. *Id.*

In the instant matter, *Hyde Leadership* is controlling. As the Board found in that case, I conclude that Baxter Academy is not a state or political subdivision exempt from jurisdiction under the first prong of the *Hawkins County* analysis. Here, the evidence shows that the

Employer was created not by the Commission that authorized the charter, as the Employer urges, but by Kelli Pryor and a group of founders, all private individuals, who successfully petitioned for the charter and incorporation under Maine law. I find, therefore, that Baxter Academy was not directly created by a Maine government entity, special statute, legislation, or public official, but instead by private individuals as a nonprofit corporation.

(2) Baxter Academy is Not Administered by Individuals Who Are Responsible to Public Officials or the General Electorate

Under the second prong of the *Hawkins County* test, "the dispositive question is whether a majority of the individuals who administer the entity – [the school's] governing board members and executive officers -- are appointed by or subject to removal by public officials." *Id.* at 6. In conducting this analysis, the Board "examines whether the composition, selection, and removal of the members of an employer's governing board are determined by law, or solely by the employer's governing documents." *Id.* An entity will be subject to the Board's jurisdiction if its governing documents "indicate that appointment and removal are controlled by private individuals – as opposed to public officials." *Id.*; see *Excalibur Charter School, Inc.*, 366 NLRB No. 49, slip op. at 2 (Mar. 29, 2018) (asserting jurisdiction over an Arizona charter school whose "board members are appointed and subject to removal only by the other sitting members of its board, not by public officials," and where the "method of selecting board members is dictated by the [school's] charter and bylaws, and not by any State or local law or regulation"); *Pennsylvania Virtual*, 364 NLRB No. 87, slip op. at 8 (asserting jurisdiction over a Pennsylvania charter school as "a private corporation whose governing board members are privately appointed and removed"). General state statutory provisions granting governmental entities the authority to remove trustees of corporations for malfeasance are insufficient, on their own, to establish exemption from jurisdiction under the second prong of the *Hawkins County* analysis. See *Hyde Leadership*, *supra* at 2 (although noting that a board of trustees member "happens to be a



public school teacher," the Board concluded that there was no evidence that she, or any other member, "has been affiliated with a public entity or the Department of Education").

In *Hyde Leadership*, the Board analyzed the operations of the school's governing board and concluded that it was subject to the Board's jurisdiction because it was "a private corporation whose governing board members are privately appointed and removed." *Hyde Leadership*, supra at 7. In so finding, the Board highlighted the following aspects of the school's operation and governance. First, the selection of Hyde's governing board was dictated by its bylaws, not by the CSA or any other law, statute, or governmental regulation. Those bylaws provided that only sitting members may appoint, remove, and fill vacancies on the Hyde board of trustees, and only board members may appoint and remove Hyde's executive director. The record contained no evidence that any local or state official had any involvement in the selection or removal of any members of the board of trustees, or in the hiring of the school's staff, including its executive director. The bylaws listed reasons for which a trustee may be removed, all of which require a majority vote of the board and no action by a state official. The Board in *Hyde Leadership* went on to reject arguments that the school did not fall under the Board's jurisdiction because the Board of Regents, in granting the charter, effectively "appointed the initial board of trustees," and "may, under certain limited circumstances, remove Hyde's trustees," including for failing to satisfy certain obligations listed in the charter, and for malfeasance under Section 226(4) of the New York Education Law. *Id.* at 6-7. Rather, the Board, focusing its analysis on the school's governing documents and the makeup of the board of trustees, concluded that "none of the trustees are responsible to public officials in their capacity as board members, and therefore that Hyde is not 'administered' by individuals who are responsible to public officials or the general electorate." *Id.* at 7.

Similarly, in the instant case, the Employer's board of trustees is a self-perpetuating body whose internal documents govern the appointment and removal of trustees. In this regard, the bylaws establish that only the trustees may set the number of trustees, elect new trustees, and

remove trustees, as well as select the corporation's officers. No provision is made in the Employer's governing documents for any state involvement in the composition and operation of the board or in the selection of executive personnel. Further, there is no evidence that any board member since the founding of Baxter Academy was, or is, a public official, or representative of any governmental entity, or has been selected or removed by a governmental officer or department. Accordingly, consistent with the Board's decision in *Hyde Leadership*, I find that that Baxter Academy's board of trustees is not responsible to public officials or the general electorate, and as such, I conclude that the Employer is not a political subdivision under the second prong of the *Hawkins County* test. As the Employer does not satisfy either prong of the *Hawkins County* analysis, I find that it is an employer within the meaning of Section 2(2) of the Act over which the Board may exercise jurisdiction.

(3) The Employer's impact on commerce is not *de minimis*.

In its oral argument at the hearing in this matter, the Employer argued that the Board should decline to assert jurisdiction because charter schools have a *de minimis* impact on interstate commerce. The Employer cited Member Miscimarra's dissent in *Pennsylvania Virtual*, 364 NLRB No. 87, slip op. at 8, in which he argued that education is fundamentally local in character and should not invoke the Board's jurisdiction. The Employer notes that the Board has relied on similar considerations in declining to assert jurisdiction in the dog and horse racing industries.

I find this argument to be without merit. First, I note that the Board has asserted jurisdiction over both private schools and charter schools and has rejected the argument that such schools have little impact on interstate commerce. *New Foundations Charter School, Inc.*, 2018 WL 329945 (January 3, 2018) (request for review denied). Significantly, the Employer, a stand-alone school, meets the \$1 million jurisdictional standard the Board has historically applied to all private schools. Moreover, having found that Baxter Academy is an employer under Section 2(2) of the Act and not a state or political subdivision exempt from the Board's jurisdiction, I am constrained to follow existing Board law and conclude that the Board has jurisdiction over the

Employer. Finally, in asserting jurisdiction in this case, I am mindful the Supreme Court "has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963).

For the foregoing reasons, I find that the Board should not decline to assert jurisdiction over Baxter Academy under Section 14(c)(1) of the Act.

### **3. CONCLUSION**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All regular teachers and guidance counselors employed by the Employer at Baxter Academy for Technology and Science, 85 Lancaster Street, Portland, Maine, in at least fifty percent of a full-time position.

Excluded: All other employees, educational technicians, adjunct faculty paid by stipend, tutors, interns, substitutes, social workers, administrative/managerial employees (including administrative assistants, director of guidance, dean of students, IT manager, business manager, operations manager, principal, head of school, and executive director), confidential employees, guards, and supervisors as defined in the Act.

### **4. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by MAINE EDUCATION ASSOCIATION.



## **A. Election Details**

The election will be held on Tuesday, May 14, 2019, in Classroom 211 at Baxter Academy for Technology and Science, 185 Lancaster Street, Portland, Maine. Voting hours will be from 2:30 to 4 p.m. The Union has agreed to waive the 10-day requirement for the voter list.

## **B. Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed by the Employer during the payroll period as of April 30, 2019, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

## **C. Voter List**

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Tuesday, May 7, 2019**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

#### **D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

#### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlrb.gov](http://www.nlrb.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: May 3, 2019

A handwritten signature in cursive script, appearing to read "Paul J. Murphy".

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PAUL J. MURPHY  
ACTING REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
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